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No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

NATIONSBANK OF TEXAS, N.A.,
Petitioner,

v.

EXECUTIVE LIFE INSURANCE COMPANY, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division One

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A federal statute authorizes the Federal Deposit Insurance Corporation to establish bridge banks to acquire the assets of insured banks that are closed and taken over by the FDIC. The question presented is whether the standard assignment by the FDIC to such a bridge bank of "all right, title and interest of the Receiver" in the assets of a failed bank assigns statutory rights held by the FDIC as receiver.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Petitioner NationsBank of Texas, N.A., was plaintiff-appellant below. Pursuant to S. Ct. Rule 29.1, petitioner notes that it is a wholly-owned subsidiary of NationsBank Texas Bancorporation, Inc., which is a wholly-owned subsidiary of NB Holdings Corporation, which in turn is a wholly-owned subsidiary of NationsBank Corporation. Petitioner has no non-wholly owned subsidiaries.

Respondents in the Court of Appeal and before this Court are Commercial National Bank in Shreveport, First Tennessee Bank National Association, First Interstate Bank of Denver, N.A., Norwest Bank, Minnesota, N.A., Texas Commerce Bank, El Paso, N.A., Group Annuity Participant Protection Association, State Street Bank & Trust Company, Underwriters Laboratories, Inc., Chelsea Industries, Inc., British Gas Exploration Production, Inc., CoCARE, and The Official Allocated Annuities Committee.

By duly authorized orders of the Superior Court in California in which this case originated, Executive Life Insurance Company was placed under the statutory conservatorship of California Insurance Commissioner John Garamendi on April 11, 1991, and was liquidated on November 6, 1991. Mr. Garamendi appeared in the Court of Appeal and accordingly he or his successor as Insurance Commissioner is a respondent before this Court.

Sunburst Bank was a plaintiff-appellant below and is a respondent before this Court pursuant to S. Ct. Rule 12.4.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner NationsBank of Texas, N.A. ("NationsBank") respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal, Second Appellate District, Division One entered in the above-captioned proceeding on May 4, 1994.

OPINIONS BELOW

The published opinion of the California Court of Appeal is reported at 24 Cal. App. 4th 1156, 29 Cal. Rptr. 2d 734, and is reprinted in the appendix hereto ("App.") at 2a. The Decision and Judgment of the Los Angeles County Superior Court are not reported, and are reprinted at App. 17a and 19a, respectively.

JURISDICTION

Petitioner NationsBank initiated this action by filing an action for declaratory relief before the Superior Court for Los Angeles County. That court issued a decision on

April 29, 1992 and entered judgment on June 11, 1992, denying NationsBank's motion for summary judgment and granting the cross-motion of respondent John Garamendi, Insurance Commissioner of the State of California. App. 17a, 19a. NationsBank perfected an appeal to the Court of Appeal, which issued an opinion affirming the judgment on different grounds on May 4, 1994. *Id.* at 2a. A timely petition for rehearing was denied by the Court of Appeal on May 27, 1994, *id.* at 16a, and the Supreme Court of California denied a timely petition for review on August 18, 1994. *Id.* at 1a.

The jurisdiction of this Court to review the decision below rests on 28 U.S.C. § 1257(a).

PERTINENT STATUTORY PROVISIONS

Pertinent provisions of the Competitive Equality Banking Act of 1987, 101 Stat. 552, 629, now codified, as amended by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), as 12 U.S.C. §§ 1821(n)(1)(B)(iii), (3)(A) (Supp. III 1991), and pertinent provisions of 31 U.S.C. § 3713 (1988), are set forth at App. 28a.

STATEMENT OF THE CASE

Introduction. On numerous occasions in the past decade, the Federal Deposit Insurance Corporation (FDIC) has taken over a failed or failing bank, created a so-called "bridge bank" to assume certain assets of the failed bank, and then—through a standard purchase and assumption agreement—assigned its rights and interests as receiver of the failed bank to the bridge bank. Such transactions have facilitated the continued functioning of the national banking system by allowing generally uninterrupted service to the failed bank's depositors and customers. Federal and state courts have concluded—consistent with the policies underlying the federal banking laws—that the assignments by the FDIC transferred to the bridge banks the *FDIC*'s rights as receiver for the failed institution, and not merely the rights and interests of the failed institution itself.

The court below, however, departed from this uniform precedent. It ruled—with respect to one of the largest and most significant purchase and assumption transactions to date—that the FDIC transferred no rights of its own to the bridge bank, but instead transferred only the rights and interests of the failed bank. This decision creates a conflict in the lower courts on a question of considerable importance to the ongoing discharge of the FDIC's statutory responsibilities, and casts a cloud over hundreds of purchase and assumption agreements previously entered into by the FDIC throughout the Nation. This Court should grant certiorari to resolve that conflict.

The question whether the FDIC transfers its rights as receiver or only the rights of the failed institution to the bridge banks it creates arises regularly in a variety of contexts. These include, for example, whether the bridge bank can assert the FDIC's longer statute of limitations in enforcing rights it acquires under the purchase and assumption agreement, whether the bridge bank can rely on the FDIC's rights under the *D'Oench, Duhme* doctrine to defeat unrecorded agreements asserted as defenses by the failed bank's debtors, and whether the bridge bank can rely on the FDIC's rights under the statutory codification of the *D'Oench, Duhme* doctrine for the same purpose. The specific context in which the issue arose in this case concerns whether the bridge bank can assert the FDIC's rights with respect to an asset acquired pursuant to the purchase and assumption agreement under a federal statute giving the government priority in pressing claims against the estates of certain insolvent entities.

The Executive Life Contract. In 1986, the Southeast Texas Housing Finance Corporation ("SETHFCO") issued $300 million in taxable municipal bonds. The Trust Indenture for the bond issue directed the Trustee—InterFirst Bank Houston N.A. ("InterFirst")—to deposit the net proceeds of the bond sale with Executive Life Insurance Company ("Executive Life") under the terms of a guaranteed investment contract (known in the trade as a "GIC"). The GIC required Executive Life to make regu-

lar payments to InterFirst, to be used to fund the debt service on the bonds and pay related administrative expenses. InterFirst could also withdraw funds from the GIC as necessary to provide financing for low-income housing. On maturity of the GIC, Executive Life was obligated to repay InterFirst the original deposit, less any withdrawals. InterFirst would then redeem the bonds from the proceeds of the GIC and any loans made with withdrawals. App. 4a & n.1.

Assignment from Receiver to Bridge Bank. When InterFirst merged into First RepublicBank of Houston, N.A. ("First Republic"), in June 1987, First Republic became the successor Indenture Trustee for the SETHFCO bond issue and holder of the Executive Life GIC. In 1988, the solvency of First Republic came under scrutiny. During the week of July 25, 1988, the FDIC created a bridge bank named JRB Bank, N.A., pursuant to 12 U.S.C. § 1821(i) (1988). Then, on July 29, 1988, the Office of the Comptroller of the Currency declared First Republic insolvent pursuant to 12 U.S.C. § 191 (1988), and named the FDIC receiver of the failed bank as required by 12 U.S.C. § 1821(c) (1988). That same day, under a court-approved purchase and assumption agreement, *see* App. 22a, the FDIC as receiver transferred all "right, title and interest of the Receiver" in First Republic's trust funds and trust business (among other assets) to JRB Bank, N.A. The bridge bank thus became the successor Indenture Trustee for the SETHFCO bond issue and holder of the GIC, and generally continued the operations of the closed bank. Later that day, the FDIC accepted the bid of NCNB Corporation, a bank holding company, to acquire the bridge bank's stock through an intermediate Texas holding company. As a result, the bridge bank was renamed NCNB Texas National Bank. The bank later changed its name to NationsBank of Texas, N.A. App. 5a-6a.

The Executive Life Insolvency. On April 11, 1991, California Insurance Commissioner John Garamendi asked the Los Angeles County Superior Court to place Execu-

tive Life into conservatorship. *See* Cal. Ins. Code § 1011 (West 1993). Executive Life did not oppose the request, and it was duly granted. At the same time the conservatorship court ordered a moratorium on all actions against, and attempts to collect from, Executive Life. Acting as conservator under California law, Commissioner Garamendi almost immediately annouced his position that the holders of GICs like NationsBank and other municipal bond trustees would be treated as general creditors in class 6 to be paid last—and, in fact, nothing at all—in the Executive Life conservatorship. *See id.* § 1033(a)(6) (West 1993).

By the terms of the SETHFCO Trust Indenture, the SETHFCO bonds went into default as a result of the conservatorship. Upon default, the SETHFCO Indenture required NationsBank as successor Trustee to take action to preserve and maximize the bond trust estate.

California Court Proceedings. NationsBank therefore filed a separate action seeking declaratory relief before the same trial judge handling the conservatorship proceeding.[1] As it had done successfully on numerous prior

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[1] NationsBank and the other similarly-situated trustees had already contended in the declaratory relief action that the municipal bond GICs should be entitled at least to a class 5 priority like other insurance products, including annuities and so-called "pension-GICs." *See* Cal. Ins. Code § 1033(a)(5) (West 1993). In November 1991, the trial court agreed and declared that the NationsBank GIC and other GICs supporting bond issues would be accorded class 5 priority as annuities certain. In November 1992, a California Court of Appeal upheld the trial court's judgment that the municipal bond GICs are "insurance annuities-certain" and that their trustee-holders qualify as "policyholders" entitled to class 5 status under any Executive Life rehabilitation plan. *Texas Commerce Bank* v. *Garamendi*, 11 Cal. App. 4th 460, 14 Cal. Rptr. 2d 854 (1992). In March 1993, that same division of the Court of Appeal set aside parts of a proposed plan of rehabilitation that in effect discriminated against NationsBank and other trustee GIC holders as class 5 claimants. *Commercial Nat'l Bank* v. *Superior Court*, 14 Cal. App. 4th 393, 17 Cal. Rptr. 2d 884 (1993). The appeals in this case were assigned to and decided by a different division of the Court of Appeal.

occasions in federal and state court, NationsBank asserted in this case that as a bridge bank assignee of an FDIC Receiver, it could assert the rights of the FDIC with respect to its claim under the GIC. In particular, NationsBank claimed that it was entitled to class 4 priority under California Insurance Code § 1033(a)(4)—which gives class 4 payment status to any claim "having preference by the laws of the United States"—because as an FDIC assignee it was entitled to the federal government priority mandated by 31 U.S.C. § 3713.[2]

NationsBank promptly moved for summary judgment on this claim, explaining (1) that the FDIC is a government agency entitled to the priority granted the United States Government in Section 3713, and (2) that under federal law and the written agreement with the FDIC, NationsBank is entitled as assignee to stand in the FDIC's shoes and assert the same rights with respect to the GIC that the FDIC could have asserted in its own right. The Commissioner filed a cross-motion for summary judgment, and he and other parties opposed NationsBank's motion.

In April 1992, the trial court denied NationsBank's motion and granted summary judgment to the Commissioner, finding that NationsBank's claim under 31 U.S.C. § 3713 was "not a claim of the United States and was not transmogrified into such by the FDIC's intervention." App. 17a. The court did not address the legal effect of the FDIC's assignment of the GIC. After the trial court entered judgment, *id.* at 19a, NationsBank timely appealed to the California Court of Appeal.

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[2] That statute provides that a "claim of the United States Government shall be paid first when * * * a person indebted to the Government is insolvent and * * * an act of bankruptcy is committed * * *." 31 U.S.C. § 3713(a)(1). The court below expressly assumed for discussion that the FDIC is entitled to priority under Section 3713(a)(1) and that its priority is assignable. App. 12a & n.8. That question is not presented by this petition. It should be resolved on remand should this Court grant the petition and reverse the decision below.

The Executive Life Rehabilitation Plan. In the meantime the Commissioner settled the class 4 priority claims of (1) the Internal Revenue Service for income taxes and (2) the Resolution Trust Corporation for repayment of, *inter alia,* losses suffered by failed thrift institutions in RTC receivership. Having previously placed Executive Life into liquidation, the trial court ultimately approved a plan of "rehabilitation" for Executive Life in August 1993, which closed in September 1993. This plan reaffirmed the declaratory judgment denying NationsBank class 4 priority. NationsBank filed timely notices of appeal from the orders approving the plan insofar as they incorporated the earlier judgment in the declaratory relief action. *See id.* at 8a n.5.

Court of Appeal Ruling. On May 4, 1994, the California Court of Appeal—ruling on all of NationsBank's class 4 appeals—upheld the Superior Court's denial of NationsBank's federal priority claim, but for different reasons. The Court of Appeal assumed *arguendo* that the FDIC (1) is an agency of the United States Government entitled to assert the federal priority and (2) has the power to assign that priority to bridge banks like NationsBank. The court held, however, that the purchase and assumption agreement between the FDIC as Receiver for First Republic and the bridge bank—specifying that "the Receiver hereby * * * assigns * * * to [the bridge bank] all right, title and interest of the Receiver" in First Republic's trust business (*id.* at 24a)—did not constitute "an assignment of *anything* belonging to the FDIC" and "did not confer upon NationsBank * * * any claim of priority the FDIC might have had." *Id.* at 13a (emphasis in original). The court read a separate section of the agreement—providing that the bridge bank would "succeed to" the fiduciary obligations of the failed bank "all to the same extent as though [the bridge bank] had originally assumed the same"—as confirmation that NationsBank's rights were limited to those that First Republic possessed, excluding any right to assert the federal priority. *Id.*

The Court of Appeal denied rehearing on May 27, 1994. *Id.* at 16a. The California Supreme Court denied NationsBank's petition for review of the Court of Appeal decision on August 18, 1994. *Id.* at 1a.

How the Federal Question Was Raised. In every pleading filed in state court, NationsBank argued that both as a matter of the federal law governing its agreement with the FDIC and independently as a matter of federal law, it was entitled as a bridge bank and FDIC assignee to assert all the rights of the FDIC in connection with the Executive Life GIC.[3] As noted above, the California trial court did not address the effect or extent of this assignment, instead ruling that NationsBank's claim was not a claim of the United States under 31 U.S.C. § 3713, despite the FDIC's involvement. App. 17a.

By contrast, the California Court of Appeal assumed *arguendo* that the FDIC would be entitled to priority under Section 3713, but held that the FDIC did not transfer that priority to NationsBank as a bridge bank pursuant to the purchase and assumption agreement assignment or federal law. App. 13a-14a. The assignment issue is governed by federal law both as a question of construction of the purchase and assumption agreement, *see* note 7, *infra*, and independently as a question of federal statutory and common law.

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[3] *See, e.g.*, Memorandum of Law in Support of Motion of NationsBank of Texas, N.A., for Summary Judgment, at 1, 4, 13-14; Consolidated Memorandum of Plaintiff NationsBank of Texas, N.A., in Opposition to the Motion for Summary Judgment of the Commissioner and in Reply to the Oppositions to Its Own Motion for Summary Judgment, at 1, 14-17; Appellants' Opening Brief (Court of Appeal), at 30-42; Appellants' Closing Brief (Court of Appeal), at 27-48; Petition for Rehearing (Court of Appeal), at 4-5 & n.1; Petition for Review (Cal. S. Ct.), at 3-4 & n.2.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT AND FEDERAL COURTS OF APPEALS HOLDING THAT THE ASSIGNMENT BY THE FDIC OF THE ASSETS OF A FAILED BANK TRANSFERS THE FDIC'S RIGHTS TO THE ASSIGNEE

The question whether a bridge bank assignee of the FDIC succeeds to the FDIC's rights or instead merely the rights of the failed bank taken over by the FDIC has arisen repeatedly in both state and federal courts in a variety of contexts. Those courts have held that the typical purchase and assumption agreement entered into by the FDIC and a bridge bank transfers to the bridge bank the rights of the FDIC as receiver, not simply the more limited interests of the failed bank. The contrary decision below conflicts with this established body of precedent. Because the question presented will continue to arise in the lower courts as a result of the many bridge bank transactions entered into by the FDIC, this Court should grant the writ and resolve the conflict.

One situation in which the question presented arises with some frequency is when an FDIC assignee bridge bank attempts to assert the *D'Oench, Duhme* doctrine with respect to an asset acquired from the FDIC as receiver. That doctrine, arising from this Court's decision in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), protects the FDIC from misrepresentations regarding the assets of banks it insures by providing that unrecorded agreements with a bank limiting the enforceability of a note cannot be asserted against the FDIC when it takes over the bank as receiver.[4] The right to rely on the *D'Oench, Duhme* doctrine is plainly a right of the FDIC as receiver and not in any sense a right of the failed institution taken over by the FDIC. Under

[4] The doctrine has been expanded beyond the facts in *D'Oench, Duhme* itself. *See, e.g., Langley* v. *FDIC*, 484 U.S. 86 (1987).

the reasoning of the California Court of Appeal below, that right would not be transferred to a bridge bank assignee of the FDIC, because the FDIC transfers no rights of its own but only those rights it received from the failed bank. *See* App. 13a (purchase and assumption agreement does not assign *"anything* belonging to the FDIC") (emphasis in original). Yet the lower courts uniformly have held that bridge banks—pursuant to purchase and assumption agreements indistinguishable from the one at issue here—succeeded to the FDIC's right to assert the *D'Oench, Duhme* doctrine.

In *Bell & Murphy & Assocs.* v. *Interfirst Bank Gateway, N.A.*, 894 F.2d 750 (5th Cir.), *cert. denied*, 498 U.S. 895 (1990), the Fifth Circuit applied *D'Oench, Duhme* to preclude plaintiffs from enforcing an unrecorded side agreement with First RepublicBank Dallas, N.A., which the FDIC took over when it became insolvent and transferred in part to NCNB Texas National Bank (*i.e.*, NationsBank) pursuant to a purchase and assumption agreement indistinguishable from the one involved in this case. The court specifically rejected the contention that "*D'Oench, Duhme*'s protections, even if applicable, do not bar a recovery against NCNB, the bridge bank authorized by the FDIC to acquire the assets and liabilities of the failed Republic." *Id.* at 754. The Court of Appeals reasoned that "failure to extend *D'Oench, Duhme*'s protection to bridge banks would undermine the effectiveness of bridge banks as a means of continuing the normal banking operations, and therefore protecting the depositors and creditors, of a failed bank." *Id.* The court accordingly held that "claims barred as to the FDIC by the *D'Oench, Duhme* doctrine likewise are barred as to bridge banks authorized by the FDIC to take over the operations of a failed bank." *Id.* at 754-755. The Fifth Circuit applied this holding in another case arising out of the very same purchase and assumption agreement at issue here, *Kilpatrick* v. *Riddle*, 907 F.2d 1523 (5th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991), ruling that plaintiffs were barred by *D'Oench,*

Duhme from asserting certain securities claims against both the FDIC as receiver for First RepublicBank and NCNB Texas National Bank (*i.e.*, NationsBank) as bridge bank assignee of the FDIC.

The Fifth Circuit has adhered to this understanding of the rights of FDIC assignees in cases involving similar purchase and assumption agreements. *Porras* v. *Petroplex Savings Ass'n*, 903 F.2d 379 (5th Cir. 1990), for example, involved a private party FDIC assignee, not a bridge bank. Relying on *Bell & Murphy*, the court ruled that the holding that an assignee succeeds to the FDIC's *D'Oench, Duhme* rights applied with equal force. The court explained that it was the "primary duty" of the FDIC to protect depositors of failed institutions, and that "[t]he preferred method of ensuring that depositors are paid is through the use of purchase and assumption agreements." *Id.* at 380. As the court reasoned:

> Purchase and assumption agreements are preferred because they minimize the corporation's losses, expand the purchasing institutions' opportunities at low risk, and protect depositors. * * * *D'Oench, Duhme* promotes purchase and assumption transactions by offering the purchaser protection from secret agreements that tend to affect adversely its rights in the instruments that it acquires. * * * Extending *D'Oench, Duhme* to transferees of assets from the FSLIC, therefore, provides the FSLIC with greater opportunity to protect the failed institutions' assets. [*Id.* at 381.]

See also FSLIC v. *Cribbs*, 918 F.2d 557, 560 (5th Cir. 1990) (contention that assignee of FSLIC is not entitled to same protection of *D'Oench, Duhme* enjoyed by FSLIC rejected as "wholly meritless"). The Eleventh Circuit, relying on the Fifth Circuit's opinion in *Porras*, has applied the same rule. *Victor Hotel Corp.* v. *FCA Mortgage Corp.*, 928 F.2d 1077, 1083 (11th Cir. 1991) ("No dispute exists as to whether *D'Oench*'s protection extends to successors in interest to the FSLIC.") (citing *Porras*, 903 F.2d at 381).

The Eighth Circuit reached the same result as the Fifth and Eleventh Circuits in *FDIC* v. *Newhart*, 892 F.2d 47, 50 (8th Cir. 1989), in the context of applying 12 U.S.C. § 1823(e) (1988), the statutory codification of *D'Oench, Duhme*. The case concerned an alleged oral agreement by a bank that it would not look to a surety for repayment of certain promissory notes. After the bank became insolvent, the FDIC in its corporate capacity purchased the notes and later sold them to a private third party pursuant to a purchase and assumption agreement. The court held that the private third party succeeded to the FDIC's rights under 12 U.S.C. § 1823(e), explaining that "the FDIC transfers its protected status to subsequent purchasers of notes it holds." 892 F.2d at 50. The court based its holding on "the law of commercial paper" and policy arguments identified by the district court:

> [A] contrary result would emasculate the policy behind § 1823(e) of promoting purchase and assumption transactions. If holder in due course status did not run with the notes acquired by the FDIC in purchase and assumption transactions, the market for such notes would be smaller, which would have a deleterious effect on the FDIC's ability to protect the assets of failed banks. [892 F.2d at 50.]

The question presented by this petition also arises frequently in connection with the statute of limitations applicable to claims that bridge banks acquire by assignment from the FDIC pursuant to purchase and assumption agreements. In the hands of the insolvent institution, such claims are governed by the applicable state statute of limitations, and state law governs related questions such as when the statutory period begins to run. The FDIC as receiver, however, enjoys the benefit of federal statutory provisions specifying typically longer limitations periods and providing that the period does not begin to run until appointment of the FDIC as receiver or the date the claim accrues, whichever is later. *See* 12 U.S.C. § 1821(d)(14) (Supp. III 1991); 28 U.S.C. § 2415(a) (1988).

Under the reasoning of the California Court of Appeal below, the FDIC as receiver transfers to an assignee bridge bank no right of its own, but only the rights and interests of the failed institution. Accordingly, under the ruling below, the claims of an FDIC assignee bridge bank would be governed by the same state statute of limitations that governed the claims in the hands of the failed institution. Yet the lower courts uniformly have held that bridge banks—pursuant to purchase and assumption agreements indistinguishable from the one at issue here—succeeded to the longer statute of limitations period and more favorable accrual date enjoyed by the FDIC as receiver.

For example, in *FDIC* v. *Bledsoe*, 989 F.2d 805 (5th Cir. 1993), the Fifth Circuit recently noted that the pertinent federal statutory provisions did not address the question whether an assignee inherits the federal receiver's limitations period. The court accordingly looked to common law to fill the statutory gap.

> Fortunately, while the statute is quiet, the common law speaks in a loud and consistent voice: *An assignee stands in the shoes of his assignor.* * * * Applying this common law principle to the case at hand, Federal Savings, as the assignee, stood in the shoes of the FSLIC, the assignor, and thus received the FSLIC's six year period of limitations. [*Id.* at 810 (emphasis in original).]

While the California Court of Appeal specifically rejected the argument that the cases holding that assignees succeed to the FDIC's rights under *D'Oench, Duhme* support the contention that they similarly succeed to the FDIC's priority, *see* App. 13a-14a, the Fifth Circuit in *Bledsoe* relied on the *D'Oench, Duhme* cases to support its holding that assignees succeed to the federal receiver's longer period of limitations. Citing *Porras, Bell & Murphy, Cribbs*, and *Newhart*, *see supra* at 10-12, the Fifth Circuit explained that its "conclusion that the federal six year statute of limitations transfers to private assignees

is bolstered by the closely related line of cases by which we have extended the protection of the *D'Oench, Duhme* doctrine to private assignees of the FDIC and the FSLIC." 989 F.2d at 810-811 & n.7. The court recognized that the same policy of facilitating purchase and assumption agreements to allow the FDIC to rid the federal system of failed bank assets that supported extension of the receiver's *D'Oench, Duhme* rights to assignees also supported a similar extension of the receiver's right to a longer limitations period. *Id.* at 811.

Every state court of last resort to have considered the question has reached the same result as the Fifth Circuit in *Bledsoe*, for the same reasons. In *Tivoli Ventures, Inc.* v. *Bumann*, 870 P.2d 1244 (Colo. 1994), the FDIC as receiver gained possession of a note from a failed institution and then entered into an agreement pursuant to which it assigned its "right, title and interest" in the note to Lease Finance—the same operative language that is at issue in this case. *See* App. 24a. Recovery on the note was barred unless this assignment transferred the FDIC's right to the federal limitations period. The Supreme Court of Colorado held that it did, noting that "[a]llowing private-party assignees to step into the shoes of the FDIC for purposes of the statute of limitations facilitates expunging the federal system of failed bank assets and is consistent with the intent and language of the federal statute as well as the requirements of the common law." *Id.* at 1250. Like the Fifth Circuit in *Bledsoe*, the Colorado Supreme Court relied upon the cases extending *D'Oench, Duhme* protections to FDIC assignees in extending the federal statute of limitations to them as well. *Id.* at 1249.

The Supreme Court of Texas recently reached the same result in *Jackson* v. *Thweatt*, 883 S.W.2d 171 (Tex.), *cert. denied*, 115 S. Ct. 196 (1994), holding that "the FDIC's successors in interest are entitled to the benefits of section 1821(d)(14) pursuant to the common law maxim that '[a]n assignee stands in the shoes of his as-

signor.' " *Id.* at 174 (quoting *Bledsoe*, 989 F.2d at 810). The Texas Supreme Court noted that this rule was "particularly compelling with regard to notes acquired by the FDIC from an insolvent bank and sold to third parties pursuant to a purchase and assumption transaction." *Id.* The court explained that a contrary result would diminish the value of the notes in the hands of the FDIC, noting that the "FDIC can only make full use of the market in discharging its statutory responsibilities if the market purchasers have the same rights to pursue actions against recalcitrant debtors as does the FDIC." *Id.* (quotation omitted). Like the Fifth Circuit in *Bledsoe* and the Colorado Supreme Court in *Tivoli Ventures*, the Texas Supreme Court analogized to the cases extending "the FDIC's special rights" under *D'Oench, Duhme* and 12 U.S.C. § 1823(e) to assignees. *See* 883 S.W.2d at 175.

The Supreme Court of Kansas followed the same approach and arrived at the same conclusion in *Cadle Company II, Inc.* v. *Lewis*, 254 Kan. 158, 864 P.2d 718 (1993), *cert. denied*, 114 S. Ct. 1613 (1994), agreeing with the FDIC assignee's argument that "because it was assigned the note by the FDIC, it succeeded to all the rights and remedies available to the FDIC, including the six-year limitations period." 864 P.2d at 720, 724. The court quoted from *Mountain States Financial Resources* v. *Agrawal*, 777 F. Supp. 1550, 1552 (W.D. Okla. 1991), for the proposition that "[a]n assignee stands in the shoes of the assignor, and acquires *all* of the assignor's rights and liabilities in the assignment. This general principle and a strong public policy require that the FDIC's assignee acquire the six-year limitations period provided by § 1821(d)(14)(A)." 864 P.2d at 721 (emphasis added). The Kansas Supreme Court also relied on the analogy to the *D'Oench, Duhme* cases. *Id.* at 721-723.

Central States Resources, Corp. v. *First National Bank in Morrill*, 243 Neb. 538, 501 N.W.2d 271 (1993), involved a participation interest in a loan acquired by the FDIC as receiver from an insolvent institution and assigned to Central States. The Supreme Court of Nebraska

ruled that "[u]nder a participation agreement, a 'downstream' bank is akin to an assignee of a promissory note who stands in the shoes of the assignor and obtains the right, title and interest that the assignor had at the time of assignment." *Id.* at 276. Included in that "right, title and interest" transferred to the assignee, the court ruled, is the FDIC's right to assert the federal statute of limitations. *Id.* at 278.[5]

The decision of the California Court of Appeal conflicts with this uniform body of precedent, both in result and reasoning. The court below held that the FDIC's assignment of "all right, title and interest of the Receiver in and to" enumerated assets of the failed bank was not "an assignment of *anything* belonging to the FDIC." App. 13a (emphasis in original). The federal circuit and state supreme court precedent outlined above holds that under indistinguishable assignment language the FDIC does indeed assign things that belong to it as receiver but do not belong to the failed institution. The right to rely on *D'Oench, Duhme,* on 12 U.S.C. § 1823(e), or on the federal statute of limitations in 12 U.S.C. § 1821(d)(14) or 28 U.S.C. § 2415(a) are rights belonging to the FDIC that plainly do not belong to the failed institution, yet the uniform rule is that those rights are transferred to FDIC assignees along with the assets to which the rights relate.

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[5] Federal district court and lower state court decisions are now uniformly to the same effect. *See, e.g., Mountain States Financial Resources Corp.* v. *Agrawal,* 777 F. Supp. at 1552; *North American Credit Consultants* v. *Garlick Sales & Services Co.,* No. Civ. 91-1066-C, 1992 WL 477016, at *3 (W.D. Okla., Oct. 20, 1992); *Fall* v. *Keasler,* No. C 90 20643 SW, 1991 WL 340182 at *3 (N.D. Cal., Dec. 18, 1991) (when FDIC assignee "took the assignment of the note he also took the benefit of the statute of limitations afforded the FDIC;" analogy to *D'Oench, Duhme* cases); *White* v. *Moriarity,* 15 Cal. App. 4th 1290, 1297-98, 19 Cal. Rptr. 2d 200, 204 (1993); *Cadle Company II, Inc.* v. *Stamm,* 633 So. 2d 45, 46 (Fla. Dist. Ct. App. 1994); *Martin* v. *Pioneer Title Co.,* No. 96438, 1993 WL 381101 at *2-3 (Idaho Ct. App., July 8, 1993).

The decision below also rejects the reasoning of the other cases. The California Court of Appeal expressly declined in its opinion to follow cases such as *Bell & Murphy* and *Cadle Company II, Inc.* v. *Lewis,* which extended the *D'Oench, Duhme* doctrine to FDIC assignees, arguing that the doctrine has never been applied "to create an implied assignment bestowing upon an assignee of the FDIC a governmental priority over other claimants." App. 14a. But all of the cases discussed above did in fact "create an implied assignment." In none of the cases did the language of the purchase and assumption agreement specifically assign the FDIC's right to rely on the federal statute of limitations or *D'Oench, Duhme,* and in none of the cases did the language of the federal statutes conferring these rights on the FDIC provide that the rights were conveyed to assignees. Applying common law rules and federal banking policy, and filling in the gaps in the pertinent federal statutes, the courts nonetheless concluded—without exception—that FDIC assignees acquired such rights when they succeeded to the *FDIC*'s rights in the assets of the failed institution.

Nor is the right to assert the FDIC's priority at issue in this case in any sense a more extensive right than the rights at issue in the other cases. The right to assert the FDIC's statute of limitations allows assignees to assert claims against third parties that would otherwise be barred altogether under state law. The right to assert the *D'Oench, Duhme* doctrine or the FDIC's rights under 12 U.S.C. § 1823(e) allows assignees to defeat agreements otherwise fully enforceable under state law. The right to assert the FDIC's priority in a liquidation is markedly less intrusive than these other rights that courts uniformly have found are assigned by the FDIC along with and incident to the assignment of the assets of the failed institution.

II. THE DECISION BELOW THAT THE ASSIGNMENT BY THE FDIC DID NOT TRANSFER ANY RIGHTS OF THE FDIC IS WRONG

Given that the decision below conflicts with a uniform body of precedent holding that the FDIC transfers *its* rights as receiver to assignee banks—and not merely the lesser rights it inherited from the failed institutions—it should come as no surprise that the decision below is also wrong. The reasoning in the foregoing cases from the Fifth, Eighth, and Eleventh Circuits, and the Supreme Courts of Colorado, Texas, Kansas, and Nebraska, make that clear.

As those courts have explained, the statutory provisions conferring certain rights on the FDIC as receiver, and authorizing the FDIC to assign the assets of failed institutions it has taken over to bridge banks or other third parties, do not specifically address the question of whether the rights of the FDIC as receiver are conveyed to the assignee along with the assets of the failed institution. The Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") simply authorizes the FDIC to establish bridge banks to purchase such assets of the closed bank as the FDIC may, in its discretion, determine to be appropriate. 12 U.S.C. § 1821(n)(1)(B)(iii). Like the FDIC statute of limitations provision (12 U.S.C. § 1821(d)(14)(A)) and the *D'Oench, Duhme* provision (12 U.S.C. § 1823(e)), the provision which the court below assumed conferred priority on the FDIC, 31 U.S.C. § 3713(a)(1), *see* App. 12a, is also silent with respect to whether that priority is transferred to FDIC assignees.

As the Fifth Circuit explained in *Bledsoe*, when "the statute at hand is silent as to the rights of assignees, we turn to the common law to fill the gap" in the statutory scheme. 989 F.2d at 810. Here the common law provides a clear rule: an assignee stands in the shoes of its assignor, inheriting all right, title and interest of the assignor. *Id.*

As this Court explained long ago, with respect to a government contract, "[a] voluntary assignee is ordinarily invested with all the rights his assignor possessed." *Hofeld* v. *United States,* 186 U.S. 273, 276 (1902). This is not a novel proposition of law. Contract and commercial law both operate under the same premise. One prominent commentator refers to the "rule that the assignee is entitled to the benefit of any rights or remedies available to the assignor." *Williston on Contracts* § 432A at 202 (3d ed. 1960); *accord,* 4 *Corbin on Contracts* § 905 (1963); Restatement, Second, Contracts § 336(1) and cmt. b (1981). The Uniform Commercial Code applies the same rule: the assignee is vested with "such rights as the [assignor] has" in the negotiable contract. U.C.C. § 3-201; *accord,* § 8-301 (negotiable securities).

Among the rights of the assignor acquired by an assignee is the assignor's right to priority in insolvency proceedings. *Williston on Contracts* § 432A at 202; Restatement, Second, Contracts § 340(1) and cmt. a (1981).[6] This Court applied that rule in *Bramwell* v. *United States Fidelity & Guar. Co.,* 269 U.S. 483 (1926), holding that an assignment by an agent of the United States government conveys the government's right to priority under 31 U.S.C. § 3713. In *Bramwell,* USF&G had paid an insured deposit of Indian funds held in trust in a failed bank by an agent of the Secretary of the Interior and

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[6] Restatement, Second, Contracts § 340(1) at 86 (1981) states: "An assignee is entitled to priority of payment from the obligor's insolvent estate to the extent that the assignor would have been so entitled in the absence of assignment." Comment a to that section states: "*Priority.* The principle that an assignment transfers to the assignee the same right held by the assignor, with its advantages and disadvantages, applies to priority of payment in insolvency proceedings." *See, e.g., In re SPM Mfg. Corp.,* 984 F.2d 1305, 1318 (1st Cir. 1993) ("a valid assignment of a debt does not divest the claim of its priority * * *; the assignee steps into the shoes of the assignor for the portion of the debt assigned") (Massachusetts law); *In re Allen Carpet Shops, Inc.,* 27 B.R. 354, 357 (E.D.N.Y. 1983) ("It is well established in case law that assignees of wage claims are entitled to the wage priority position of their assignors.") (citations omitted).

been assigned the government's claim against the failed bank. Applying the direct predecessor to Section 3713, this Court stated that USF&G, having "received from the United States an assignment of its claim against the bank, * * * has the priority, if any, that belonged to the United States." *Id.* at 486. While it is true that USF&G—as surety for the government—was entitled to the priority as a matter of statute, this Court plainly premised its decision on the broader proposition that USF&G was entitled to assert the government priority as assignee of the government.

The policies underlying the federal banking statutes compel the same result indicated by the settled common law rule, and other courts have consistently looked to those policies in ruling that the FDIC assigns to bridge banks its rights—not simply those of the failed institution —when it enters into purchase and assumption agreements. Two sets of policies intersect in deciding the question presented. First, Congress has conferred on the FDIC certain rights that it enjoys as receiver of a failed institution that are beyond those of the failed institution itself—the *D'Oench, Duhme* rights, the longer limitations period, and—we submit—the right to priority in cases of insolvency. Second, in authorizing the FDIC to create bridge banks and transfer to those banks certain assets of closed banks, Congress established a means for the FDIC promptly "to rid the federal system of failed bank assets" and ensure generally uninterrupted service for failed bank depositors and customers. *Bledsoe,* 989 F.2d at 811 (*quoting Fall* v. *Keasler,* No. C 90 20643 SW, 1991 WL 340182 (N.D. Cal. Dec. 18, 1991)).

It is plain that only a recognition that the FDIC assigns its special rights with respect to failed bank assets when it assigns those assets will serve both of these critical policies. If the FDIC did not assign its special rights along with the underlying assets to which they relate, the failed bank assets would be worth markedly less to any prospective assignee than they are in the hands of the FDIC. *Jackson* v. *Thweatt,* 883 S.W.2d at 174; *Tivoli*

Ventures, 870 P.2d at 1250; *Cadle Company II,* 846 P.2d at 722-723. To secure the full value Congress intended it to enjoy as a result of its special rights as receiver, the FDIC would be obligated to retain the assets itself. Such a result, however, would run directly counter to the congressional policy encouraging the FDIC—through the creation of bridge banks—to act promptly to rid the federal system of the assets of failed banks. *See Bell & Murphy,* 894 F.2d at 754; *FDIC* v. *Newhart,* 892 F.2d at 50; *Porras,* 903 F.2d at 381. Recognition that the FDIC transfers *its* rights in the assets of the failed bank, rather than simply the rights of the failed bank when it assigns those assets, serves both the policy underlying Congress' decision to confer special rights on the FDIC as receiver, and the policy underlying Congress' decision to authorize the FDIC to establish and use bridge banks to rid the federal system of failed bank assets.

The FDIC has relied on the effectiveness of its unrestricted assignment language in resolving the recent rash of bank insolvencies. The whole point of that language is to relieve the FDIC of the burden of collecting the note assets and managing the trust assets of large banking organizations that fail. If, however, the FDIC runs the risk that its assignment language will be held ineffective to empower the assuming banks to take action with confidence that they will be treated just like the FDIC, the FDIC will be faced with the difficult dilemma of choosing whether to handle the assets itself as receiver or to obtain less from assuming banks for those assets.

This Court relied upon similar policy considerations in upholding a priority claim under 31 U.S.C. § 3713 that benefitted a private lender in *SBA* v. *McClellan,* 364 U.S. 446 (1960). A private lender had joined with the Small Business Administration in making a loan, and when the debtor became insolvent the SBA agreed to turn over to the private lender a portion of any distribution it received from the estate. This Court held that such an agreement did not defeat the government's priority claim under Sec-

tion 3713, noting that the SBA's mission included encouraging private banks to loan to small businesses, and that the agreement at issue was well adapted to that end. Accepting the argument that the agreement with the private lender should defeat the priority "would make it more difficult for the Administration to perform its statutory duties." *Id.* at 452. So too here accepting the argument that the FDIC does not assign its priority when it assigns "all right, title and interest" in the underlying asset (App. 24a) would seriously hamper the FDIC in performing its statutory duties. The Court in *McClellan* rejected the argument that the agreement at issue unfairly elevated the private lender over other creditors: "[T]his position is a result, not of any inequality of distribution on the part of the bankruptcy court, but of the bank's valid contract with the [SBA]." 364 U.S. at 452-453. Again, the same is true here, and the contrary ruling of the court below interferes with the FDIC's ability to discharge its statutory responsibilities.

The court below viewed the language of the purchase and assumption agreement as an impediment to the conclusion that the FDIC transferred its rights as receiver to NationsBank, but other courts have reached the opposite result on the basis of indistinguishable operative language. The construction of the standard purchase and assumption agreement assigning all right, title, and interest of the FDIC as receiver in a failed bank's assets to a bridge bank is governed by federal law.[7] Nothing in the

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[7] *See, e.g., United States* v. *Seckinger*, 397 U.S. 203, 209-210 (1970) ("federal law controls the interpretation of the contract. * * * This conclusion results from the fact that the contract was entered into pursuant to authority conferred by federal statute and, ultimately, the Constitution") (footnote omitted); *United States* v. *County of Allegheny*, 322 U.S. 174, 183 (1944) ("The * * * construction of contracts [executed by the United States] * * * present[s] questions of federal law not controlled by the law of any State"); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366-367 (1943); *United States* v. *Tharp*, 973 F.2d 619, 621 (8th Cir. 1992); *Grosinsky* v. *United States*, 947 F.2d 417, 419 (9th Cir. 1991); *United States* v. *Triple A Machine Shop, Inc.*,

language of that agreement is inconsistent with the conclusion compelled by federal policy and common law.

Section 3.1 of the agreement assigned to the bridge bank "all right, title and interest *of the Receiver* [the FDIC] in and to" certain listed assets. *Id.* at 24a (emphasis added). Included in the assets assigned were the failed bank's "trust business," which included the GIC. *Id.* at 25a; *see NCNB Texas Nat'l Bank* v. *Cowden,* 895 F.2d 1488, 1497 (5th Cir. 1990). It is difficult to conceive of a more forceful way to provide that the bridge bank was assigned *everything* the FDIC as receiver possessed in connection with the trust business than to assign "all right, title and interest of the Receiver," without limitation. Another portion of the agreement, Section 3.1(o), expressly *restricted* rights as to *other* assets, App. 25a, demonstrating the unlimited nature of the FDIC's assignment with respect to the trust business assets. As noted, other courts construing similar "right, title and interest" language have never suggested that the agreement's encompassing language limited the assignee's rights.

To support its contrary conclusion, the court below turned to a provision of the agreement that appears several pages after Section 3.1, in a different article, pertaining to "Assumption of Certain Duties and Obligations." That provision, Section 4.7(a), states:

> The Assuming Bank shall * * * succeed to the rights, obligations, properties, assets, investments, deposits, agreements and trusts of the Failed Bank under (i) trusts, executorships, administrations, guardianships, agencies and (ii) other fiduciary or

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857 F.2d 579, 585 (9th Cir. 1988). *See also Downriver Comm. Fed. Cr. Un.* v. *Penn Sq. Bank,* 879 F.2d 754, 759 (10th Cir. 1989) ("As of the moment that a national bank is declared insolvent and goes into the hands of a receiver, federal law governs the distribution of the bank's assets."), *cert. denied,* 493 U.S. 1070 (1990); *Dababneh* v. *FDIC,* 971 F.2d 428, 433 (10th Cir. 1992). The purchase and assumption agreement itself provides that it is governed by federal law. App. 27a.

> representative capacities, all to the same extent as though the Assuming Bank had originally assumed the same * * *. [App. 26a-27a.]

The Court of Appeal concluded that Section 4.7(a) warranted a limited reading of the earlier unrestricted assignment of Section 3.1, because the later section manifested an intent to transfer only the rights that the failed banks had in the trust assets, as though NationsBank were the original trustee and the FDIC were never involved. App. 13a.

Properly construed, however, none of the terms of Section 4.7(a) or any other provision of Article IV purport to limit anything in Section 3.1 or any other provision of Article III. Far from limiting the bridge bank's rights, Section 4.7(a) affirmatively empowers NationsBank to act as successor fiduciary with respect to the trust business. Because the FDIC was never appointed as fiduciary for any trust matter, it had no such appointments to "assign" to the bridge bank. If the bridge bank were to assume the fiduciary appointments and obligations, it could do so only by "succeeding" to the appointments of the failed bank. This is why Section 4.7(a) is written in terms of "succession" to the rights of the *failed bank* rather than to the rights of the FDIC. And by providing that this succession accomplished such a transfer of rights and duties "to the same extent as though [the bridge bank] had originally assumed the same," the agreement made clear that the succession was unlimited.[8]

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[8] The Fifth Circuit confirmed this understanding of the agreement in *Cowden*. There, beneficiaries of trusts for which an insolvent First RepublicBank had been acting as trustee and which the FDIC had assigned to NationsBank challenged the validity of NationsBank's succession to the fiduciary appointments and its power to make distributions under the trust instruments. The Fifth Circuit agreed with the FDIC that the language of Section 4.7(a)—the precise language the California Court of Appeal misconstrued as *limiting* the FDIC's authority to assign the federal priority—was effective to transfer the fiduciary appointment powers to NationsBank. 895 F.2d at 1497-1501.

Section 4.7(a) was thus designed to facilitate the transfer of fiduciary duties to NationsBank and enable NationsBank to assume those duties without the need to seek state court appointments. It was not in any way intended to *limit* the rights of the bridge bank. In short, the "specific" language of Section 4.7(a) does not apply to, much less override, the "general language" of Section 3.1 conveying to NationsBank "*all* right, title and interest" of the FDIC Receiver—including the right to priority under 31 U.S.C. § 3713.

III. THE QUESTION PRESENTED IS IMPORTANT TO THE NATIONAL BANKING SYSTEM

The power to establish bridge banks was one of the most important tools sought by the FDIC as a means to resolve the surge in bank failures occurring in the mid to late 1980s. In considering the Competitive Equality Banking Act of 1987—which provided the FDIC with the authority to establish bridge banks—Congress acknowledged that the surge of bank failures at the time was likely to continue and that, among other factors, "the relatively large size of some troubled banks" made it "increasingly difficult to find purchasers for all failed banks." S. Rep. No. 19, 100th Cong., 1st Sess. 22 (1987).

The FDIC sought the authority to establish bridge banks in order to "enhance its ability to handle failed and failing banks with minimum disruption to local economies and minimum cost to the insurance fund." 133 Cong. Rec. 6804-05 (1987) (Remarks of Sen. Proxmire). As Robert Clark, then Comptroller of the Currency, explained to the Senate Banking Committee, once the FDIC gained the authority to establish bridge banks, "it is more likely that a purchase could be arranged for the [failed] bank, thus saving the FDIC money while continuing to provide banking services to the community." *Strengthening the Safety and Soundness of the Financial Services Industry: Hearings Before the Sen. Comm. on Banking, Housing, and Urban Affairs*, 100th Cong., 1st Sess. 7 (1987) (statement of Robert Clark). In considering the

amendments to the bridge bank statutory provisions accomplished by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Congress recognized that the FDIC uses its power to establish a bridge bank "in order to preserve or attempt to preserve the going concern value of an institution." H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. 397 (1989).

The legislation enacted by Congress provides the FDIC with broad powers in establishing bridge banks. The Competitive Equality Banking Act provided the FDIC with the discretion to determine when to establish a bridge bank, 12 U.S.C. § 1821(i)(1) (1988), and which assets and liabilities of the failed bank will become part of the bridge bank. *Id.* § 1821(i)(3)(A). The 1989 amendments to the bridge bank legislation accomplished by FIRREA committed even more discretion to the FDIC by removing the provision which required court approval of the FDIC's decision to establish a bridge bank. *Id.* § 1821(n)(3)(A)(iv) (Supp. III 1991).

The FDIC uses its power to establish bridge banks in order to resolve the problems caused by the largest bank failures. For example, the FDIC handled the three largest bank failures in 1989 by placing over 20 billion dollars of assets of these banks into three bridge banks. 1989 FDIC Annual Report 12-13. Although one of these bridge banks was sold almost immediately, the remaining two bridge banks carried on the business of the failed banks for a number of months until purchasers could be found. *Id.* at 13. Similarly, in 1992, the FDIC handled "one of the largest failed bank transactions in FDIC history" by placing 8.8 billion dollars of assets of 20 subsidiaries of First City Bancorporation of Texas into 20 bridge banks. 1992 FDIC Annual Report 34. These bridge banks operated for several months until they were sold to various purchasers through purchase and assumption agreements. 1993 FDIC Annual Report 23. These examples illustrate the importance of bridge banks in continuing the business of the largest failed banks as a means

of providing virtually uninterrupted service to consumers and protecting the going concern value of the failed banks until a purchaser can be found. In the absence of the FDIC's authority to establish bridge banks, the FDIC would be unable to shop for a suitable purchaser for these largest of failed banks and would be forced either to accept a lower sale value, or to liquidate these large banks at great cost.

As discussed above, however, the value of a bridge bank's assets is significantly lowered if potential buyers do not have confidence that the buyer will succeed to the rights of the FDIC in the acquisition of the assets of the failed bank. The ultimate purpose of the FDIC's statutory authority in establishing bridge banks is to return the assets of the failed bank, as passed through the bridge bank, back into the private sector. H.R. Conf. Rep. No. 261, 100th Cong., 1st Sess. 174-175 (1987) (a bridge bank "enables the FDIC to bridge the gap between the failed bank and a satisfactory purchase-and-assumption or other transaction that cannot be accomplished at the time of failure"). It is only through purchase and assumption agreements, however, that this ultimate statutory authority can be effectuated. If the FDIC and potential purchasers of failed banks cannot have confidence that the FDIC's assignment through the purchase and assumption agreement is effective in passing the rights of the FDIC to the buyer, the FDIC will be forced to handle the assets itself as receiver, or to accept a lower price for those assets; either of these outcomes frustrates the important federal policy goals behind granting the FDIC the authority to establish bridge banks.

The language of the purchase and assumption agreement in the instant case is not original or unusual; as is evident from the cases cited above, the FDIC uses similar if not identical language in all its purchase and assumption agreements with bridge banks. The FDIC relies on this unrestricted assignment language in order to receive a premium from purchasers who will obviously

pay more for assets which are accompanied by the FDIC's powers as receiver under the federal banking laws.

The decision below, moreover, affects transactions of the FDIC beyond bridge banks and casts a cloud on the effectiveness of the FDIC's assignment of its "right, title and interest" through purchase and assumption agreements with third parties with or without the establishment of a bridge bank. The FDIC entered into more than 500 such purchase and assumption transactions from 1989-1993 alone.[9] As is clear from the reported decisions cited above, the operative language of these purchase and assumption agreements is similar, if not identical, to the language contained in the purchase and assumption agreement between NationsBank and the FDIC in the instant case. If this Court does not address whether the standard purchase and assumption agreement passes the FDIC's statutory rights on to assignees, then the effectiveness of hundreds of purchase and assumption agreements already entered into by the FDIC with bridge banks and with other third parties will be called into question. Furthermore, if the decision below stands—in contradiction to every other court to have considered the question—then the FDIC will be hampered not just in its bridge bank transactions but in all future transactions in which it relies on its purchase and assumption agreement to allow the assets of failed banks to remain in the private sector.

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[9] Since at least 1988, the FDIC has used purchase and assumption agreements to handle the vast majority of the Nation's failed banks. *See* 1993 FDIC Annual Report 21 (FDIC used purchase and assumption transactions to resolve 30 of the 41 failed banks for the year); 1992 FDIC Annual Report 35 (purchase and assumption agreements used in resolution of 83 of the 120 failed banks); 1991 FDIC Annual Report 20 (103 of the 124 bank failures resolved through purchase and assumption agreements); 1990 FDIC Annual Report 24 (148 of 168 failed banks handled through purchase and assumption agreements); 1989 FDIC Annual Report 12 (purchase and assumption agreements used to resolve 84 percent of the total 174 bank failures).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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